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MANAGING BRIBERY & CORRUPTION

A framework for Australian businesses

Asia Taskforce is an initiative of

Business Council of Australia

Asia Society Australia

Knowledge partners

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The University of Sydney Business School

BACKGROUND

This Discussion Paper has been prepared as part of a series of short reports on specific topics identified by the Asia Taskforce (Taskforce) - an initiative of the Business Council of Australia and Asia Society Australia together with knowledge partners PwC Australia and the University of Sydney Business School - to supplement the findings and recommendations contained in the Interim Report and Final Report (out in late November 2020). One of the objectives of the Taskforce was to identify barriers to success in Asia – bribery and corruption (B&C) stands out as a key concern for management, boards and investors.

The Discussion Paper is intended to contribute to a broader discussion about how Australian capability and talent can be involved in helping developing Asian countries reach their economic potential. It provides a starting point for Australian companies which are rightly concerned by the question of whether it is possible to reconcile value and values growing a business in developing Asia.

The paper makes recommendations for business and government on this challenging issue which should also be read in the context of the "Team Australia" approach outlined in the Interim Report.

Key points:

In this Discussion Paper we aim to:

- Draw attention to the risks that Australian companies face in developing business in Asian countries as they navigate through several B&C related challenges.
- Provide an overview of the environment in developing Asia highlighting some of the most prominent B&C related challenges for new and continuing businesses.
- Outline the strategies that Australian businesses can employ to mitigate and manage the B&C risks that developing Asian economies present.
- Highlight case studies of the real-life experience of companies which have successfully managed B&C issues in the region.

A Roadmap for Success: Ten key takeaways

1. Bribery and corruption (B&C) is illegal in all markets in Asia and in Australia
2. Australian businesses can be highly successful in Asia with well-structured frameworks to manage B&C risks
3. B&C risk management MUST be an integral part of any market entry strategy with pre -market entry research and due diligence particularly important
4. Establish a comprehensive B&C risk management framework that evolves and is "live" in the business at all levels
5. Ensure Asian experience and B&C expertise is within reach through targeted hires and trusted advisors and consultants
6. Stakeholder mapping is critical to understand and manage vitally important in-market relationships
7. B&C must involve a whole of company approach from the Board cascaded down through the company and its business partners
8. Market-relevant training, delivered in local languages and reflecting in-market conditions significantly enhances B&C risk management
9. Monitoring, audits and transparent processes will ensure B&C issues are identified, escalated and managed appropriately
10. Australian Government agencies can do more to support Australian businesses to understand and deal with B&C issues

INTRODUCTION

"Many Australian companies, including publicly listed companies, have operated highly successful businesses in Asia over long periods of time in a diversity of markets."

Over the past three decades, Asian markets have played an important role in Australia's economic success, and will continue to present significant opportunities for Australian businesses. Notwithstanding these obvious opportunities, as has been highlighted in the Asia Taskforce Interim Report , there is a reluctance by Australian businesses to expand into Asia in part due to the risks, or perceived risks, of engaging with our Asian neighbours.

While Australian expatriates and multinational companies do feature in Asian financial centres such as Hong Kong, Shanghai, Singapore and Tokyo, much less engagement is paid to developing countries in Asia where high growth opportunities exist.

As part of our research and conversations with Australian business leaders as part of the Taskforce, bribery and corruption (B&C) is one risk that Australian businesses often identify as a key concern, given its potential to cause significant financial loss and reputational damage. The Transparency International 2018 Corruptions Perceptions Index (CPI) survey found the Asia-Pacific region had generally made little to no progress in combating B&C due to weak democratic institutions and a lack of anti-corruption laws and enforcement mechanisms[1]. This sentiment was reinforced in 2019, when the CPI survey illustrated a general stagnation of progress in anti-corruption efforts or results in the Asia-Pacific region[2]. But it is important to realise that B&C is a concern for businesses in Australia too. In fact Australia is handling B&C worse than its peers in the Asian Pacific region. According to the 2019 survey, Australia's CPI score (a 100-point scale where 100 points reflects the cleanest level) declined from 85 points in 2012 to 77 in 2019.

During the same period, New Zealand's score declined from 90 to 87, and Singapore declined from 87 to 85. Worryingly, PwC Australia's 2020 Global Economic Crime and Fraud Survey found that one-in-five respondents reported that they were asked to pay a bribe in Australia in the past 24 months[3].

Due to the perceived risks and potentially significant adverse consequences, B&C issues are often over-weighted in Australian companies' assessments of doing business in Asia, without understanding the actual risks involved or the controls that can be put in place. B&C has also often become the fuel of stories, rumours and myths around foreign companies operating in Asia, sometimes relayed by individuals who were ill-prepared for doing business in the region. However, many Australian companies, including publicly listed companies, have operated highly successful businesses in Asia over long periods of time in a diversity of markets (including developing Asian economies) and have successfully managed B&C risks in these markets.

> “As this report will show, B&C is a business risk – albeit a particularly challenging one – not dissimilar to foreign exchange fluctuations, dealing with labour laws in foreign jurisdictions or foreign accounting practices. This risk can be successfully managed if it forms an integral part of a company’s overall business and risk framework.”

The purpose of this report is to highlight that Australian businesses can successively navigate and manage B&C challenges and risks of doing business in Asia, particularly focusing on the Asian countries ranked lower on the CPI scale. This report provides a framework of general best practices and considerations to address common B&C issues that Australian businesses may face when entering and operating within Asia. Case studies have been drawn from real-life examples to illustrate how Australian businesses have successfully, or unsuccessfully, managed serious and extreme B&C situations. As this report will show, B&C is a business risk – albeit a particularly challenging one – not dissimilar to foreign exchange fluctuations, dealing with labour laws in foreign jurisdictions or foreign accounting practices. This risk can be successfully managed if it forms an integral part of a company’s overall business and risk framework.

Australian Government agencies, such as the Department of Foreign Affairs and Trade (DFAT) and the Australian Trade and Investment Commission (Austrade), can play a bigger role in assisting Australian businesses on this issue. This report includes recommendations to assist and improve the effectiveness of these agencies in supporting Australian businesses in managing these risks.

SETTING THE SCENE: WHAT IS BRIBERY AND CORRUPTION?

B&C have a range of definitions in law, but certain fundamental principles apply universally:

- **Bribery** is the offer, promise, giving, demanding, or acceptance of anything of value as an inducement for an action or inaction which is illegal, unethical, or a breach of trust, to obtain business or other advantage.
- **Corruption** refers to the misuse of entrusted power, whether as a government official or as the representative or employee of a private business, for private gain. Corruption can take various forms depending on the context and culture, including taking or offering a bribe, committing fraud, theft or embezzlement.

Acts of B&C are designed to influence the individual in the performance of their duties and to incentivise them to act dishonestly, normally using cash and gifts, but also through services, some of which can be highly creative (e.g. provision of funeral arrangements for family members). B&C practices can be used on non-government parties or government officials to facilitate business dealings such as tenders, licences and supply chain activities, paid by employees or management. Similarly, forms of B&C can also be used by external parties to induce internal management or employees to commit acts of fraud, theft, corporate espionage and other illegal or unethical activities.

Common issues in Asia

Over the past three decades, Asia has undergone significant change, with increasing levels of political openness, economic progress and adaptation to evolving technology. Similarly, B&C has evolved over this time and practices vary greatly across countries and industries. While blatant B&C was common and widespread in the past, and still exists in some locations, B&C can now be a lot more subtle and sophisticated in different countries and industries. In particular, requests for bribes, unfair tendering practices, and business partner or agent usage of B&C are common issues faced by Australian businesses in Asia.

Pressure to engage in B&C

Australian businesses operating in Asia enjoy a reputation for acting ethically and having a low tolerance for B&C. However, in some instances, local and foreign competitors are willing to engage in B&C to achieve success over their rivals or potential rivals. This can create an uneven playing field and result in Australian businesses perceiving themselves as being 'less competitive' in the relevant market.

In addition to competitor behaviour, one of the common challenges for in-market company representatives can be pressure from the Australian head office to improve performance and revenue growth in the Asian operations. While all businesses want to improve in these areas, a common theme that emerges is that growth ambitions for the Asian operations are often unrealistic, with limited understanding from boards on the local competition dynamics and business environment. Pressure to achieve unrealistic sales or cost reduction targets can lead to bad behaviours, including B&C issues, in the offshore operations of Australian businesses.

Attitudes towards B&C practices

Australian businesses in Asia encounter varying practices and local attitudes towards B&C. While any form of bribe is not acceptable in Australia, in some Asian locations due to the lax attitude of law enforcement, bribes may be more commonly paid and accepted, and may be viewed as a tolerated practice by locals to get out of trouble or to speed up business processes. A common example is the provision of payments to speed up administrative or bureaucratic processes. In Australia, such payments are considered unacceptable and would be viewed as a bribe. However, in some Asian countries, the making of these payments may be accepted as a common business practice and, in fact, in some countries, the making of payments of these nature may be lawful if the amounts are not material or are properly recorded. Furthermore, local practices and attitudes towards B&C can be entrenched into daily life in some societies. Although it is understood to be wrong and not generally condoned, it is viewed as a faster way, or the only way in light of the

country's power structures and imbalances, to get things done for the benefit of the family or the business. That said, B&C attitudes differ significantly across Asia. For example, a bribe commonly paid to get out of a speeding ticket in Malaysia would highly likely have you jailed for in neighbouring Singapore! Understanding attitudes towards B&C in the relevant Asian market is key, and it necessitates a strong focus on increasing knowledge aligned with cultural interpretation when designing training, controls, audit and governance systems.

Engagement and reliance on local third parties

To successfully operate in Asia, it is crucial for Australian businesses to engage with (and in some cases, rely on) a range of third parties, including agents, suppliers, joint ventures, business partners and customers. Naturally, third parties (and the individuals behind them) may conduct or be linked to practices, activities and conduct that are not aligned with the values, standards and culture of the Australian business. This can include fraud, theft, sanctions violations, money laundering and other misconduct which might constitute B&C. In turn, the conduct of third parties can expose Australian businesses to reputational, regulatory and financial risks, which can include potential legal liability. These risks are heightened in Asia where language barriers, cultural differences and, in some cases, limited information flow can result in third parties covertly engaging in these activities, thereby exposing the foreign business to risks that have a significant adverse impact.

Australian businesses need to be acutely aware that in most countries including Asian markets, relevant government agencies tasked with monitoring and enforcing anti-bribery and corruption rules and regulations will not accept the concept of "hands off" or "no direct control" of third party relationships, and will often link B&C issues directly back to the brand owner or foreign contracting company. It is thus critically important for companies to understand Australian and applicable international bribery and corruption laws that apply in the relevant markets – it is not sufficient to turn a blind eye to these issues and simply rely on third party relationships.

Successful B&C risk management

Noting the significant opportunities offered by Asia for Australian businesses, engaging in B&C practices can be seen by some companies as a tempting way of achieving quick wins or business success in Asia. However by engaging in these practices, Australian businesses are giving away one of their key competitive advantages in an Asian market: a reputation for clean and ethical business practices. B&C is also a slippery slope – once a business engages in these practices and initial easy success may be obtained, it becomes difficult to cease such practices. Furthermore, businesses which are known in the market for engaging in, or accepting, B&C practices may find themselves being targeted to engage in further such activity by opportunistic or profiteering third parties.

Being caught engaging in B&C can have significant detrimental implications. Not only are there adverse financial implications such as regulatory fines and loss of business, but the reputational damage in both the Asian and home markets can have a long-term impact on the company and brand that can be very difficult to ever recover from. Detention of local and expatriate management and the implications for these individuals and their families; the demands on crisis management and legal teams; and the need for other executives and board directors to be involved, can place huge stresses across the entire company.

Ultimately, operating a successful business in Asia means performing well financially while operating in an ethical and sustainable manner. Where B&C issues do crop up, preparation, training and prudent management will mitigate the associated risks and assist companies to protect their financial and reputational well-being.

While a zero tolerance for B&C may reduce or even stop desired business outcomes and performance, companies need to have the courage and commitment from all levels of the organisation. It is imperative that the Board, executive management, head office and local management communicate a clear 'tone from the top' to addressing B&C risk from the outset, and ensure this risk is incorporated into the business' overall risk management strategy. Successfully navigating B&C risks in a tough market can enhance the reputation and respect of the business in the market - from local governments, competitors, investors, stakeholders and customers.

Australian B&C Regulatory Framework

B&C in Australia is regulated by Australian Commonwealth and State criminal codes and Australian common law. The laws differ around AUstralia but at their core, they prohibit and criminalise conduct where a benefit is not legitimately due is given to or recived by an Australian or foriegn public official and conduct where a benefit or commission is given or received in corrupt circumstances (whether in the public or private sector). The laws apply to activities committed in an Australian territory, on an Australian vessel or by an Australian citizen or company. It also extends to entities connected to an Australian company, such as a foreign subsidiary or joint venture vehicle.

Changes are planned for Australian Commonwealth laws at the time of writing this report, with the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (Corporate Crime Bill), currently under legislative review. The Corporate Crime Bill proposes major reform to Australia's bribery laws, bringing it in line with international regulations, particularly the UK Bribery Act. One of the key changes is the proposed corporate offence of "failing to prevent" foreign bribery. In short, Australian companies could be held liable for the foreign bribery activities of their employees, external contractors, agents and subsidiaries, unless the business can demonstrate that it had 'adequate procedures' in place to manage bribery risks. The Australian government is to provide guidance on 'adequate procedures' with a draft version out for consultation earlier this year. In the meantime, similar guidance is published and available elsewhere, including in the UK and in the US. All the published guidance contains similar themes – risk assessments, due diligence, training and communication, tone from the top and culture and having a whistleblowing framework. Such themes flow throughout this report and are key to managing B&C risks in Asia.

Australian companies need to be aware of the current B&C laws and of the possible changes, however, for companies operating overseas, that in itself is not sufficient to manage B&C risks. If operating in Asia, or globally, companies can not rely on being compliant with Australian laws only - they also need to be aware of the laws of the countries in which they operate. Whilst there are key principles regarding B&C, each jurisdiction has a slightly different legal framework. A good example is around facilitation payments – e.g. payments made to officials with the intention of expediting an administrative process – under existing B&C laws in Australia this is an exemption and this does not appear to be changing under the proposed new regime. Whilst this is consistent with the US FCPA, there are no such exemptions in nearly all APAC countries, including China, Hong Kong, Indonesia and Vietnam. So whilst you may be encouraged by officials to make such payment in those territories and they may deny that such an action is wrong, by doing so you make yourself liable for prosecution under the local B&C laws.

In short, global bribery and corruption laws are complex and the laws in Asia are no different. Australian companies who operate overseas need to spend time understanding the legal and regulatory framework of the jurisdiction it is entering into or operating in and ensure compliance with local and international laws as well as domestic. In this report, we reinforce this point and hopefully provide guidance on some of the practical steps organisations can take to manage B&C risks in Asia, some of which are outlined below.

A PRACTICAL FRAMEWORK FOR B&C RISK MANAGEMENT

Handling B&C in Asia encompasses a range of activities throughout the lifecycle of the Australian business operating in the market. For all Australian companies doing, or looking to do business in Asia, there is a structured approach to elevating their B&C risk management capabilities, which can be considered through three phases of a business.

- **Market entry** – Conducting research and planning to enable optimal ability to manage B&C issues, as the business is being established.
- **Managing B&C issues as part of ongoing operations** - Operating and growing your business in a way that manages and mitigates B&C issues.
- **Handling B&C issues** – Key considerations of what to do if things go wrong.

Phase one: How to manage market entry for a new business

The preparation and entry into a new territory is one of the most important phases for any business. This is particularly so for businesses that are expanding outside their home market for the first time. New market entry exposes businesses to new challenges that they may not have experienced or foreseen in their home market. These business challenges can stem from differences in language, local business norms, regulatory and legal frameworks and general cultural customs in Asia, and these can vary greatly from country to country. Furthermore, local attitudes towards B&C can vary vastly across locations and sectors in Asia.

Having an awareness of B&C risks prevalent in the specific Asian market and the company's industry category is the first key step to managing B&C risks appropriately. It is only once these risks are fully understood in the context of the relevant local market, can effective processes and appropriate infrastructure be put in place to adequately manage and monitor the risks on an ongoing basis, as well as effectively and appropriately addressing incidences of B&C if they occur.

"If it seems to be good to be true, it probably is!" The market entry stage is often where Australian businesses can be most vulnerable to B&C risks, if not adequately prepared for it. An eagerness to enter the market and a fear of missing high growth opportunities can lead companies into relationships with the wrong suppliers, agents, introducers, joint venture partners, customers and other business partners which may ultimately result in major damage to the expansion into Asia.

> "If it seems to be good to be true, it probably is!"

This risk is especially heightened in jurisdictions which have less developed legal and regulatory frameworks to address B&C issues. Furthermore, a misunderstanding of regulatory and legal requirements can also pose issues for Australian businesses when applying for licences, permits and other regulatory requirements. In some Asian jurisdictions, slow and cumbersome government red tape is a common situation where B&C opportunities can arise. Without a clear approach and framework to managing this, Australian businesses (including their management and local employees) expose themselves to being caught up in "sticky situations" without knowing what is expected and how best to manage it. Having realistic business expectations, strong Board and executive management support and a well-written and well-communicated B&C policy will assist businesses to prepare to strongly manage the risks from the beginning.

Reality check: A case study in hidden bribery

An Australian pharmaceutical company acquired a business in South East Asia, without fully understanding the Thailand market and its business practices and norms, nor conducting thorough due diligence into the target business' finances and operations. With pressure from its head office, an attractive purchase price and competitive dynamics, the Australian company rushed to complete the purchase. Post-acquisition, the company realised that the Thai business relied heavily on bribes to ensure its operations ran smoothly.

This reality presented the purchaser with a difficult choice. Continuing to make the bribes would enable the business to continue to operate in its ordinary course without disruption to its performance, including financial results. However, continuing to make the bribes exposed the business to significant risks associated with engaging in B&C, including being the subject of regulatory enforcement action, heightened exposure to threats, other untoward opportunistic practices by third parties, and reputational damage. On the other hand, ceasing the practice of making bribes would have a detrimental impact on the business' financial performance, through loss of revenue and business opportunities as well as disruption to internal operations.

The Australian pharmaceutical company had the courage to stop all bribes to suppliers, business partners and regulators. As anticipated, this action resulted in a severe drop in revenue and financial performance and created significant disruption to the Thai operations. The decision also resulted in breakdowns in relationships with key stakeholders.

However, the company undertook a long process to rebuild the Thai business and its relationships with suppliers, business partners and regulators without engaging in B&C practices. While it took some time to recover, the business successfully returned to operating profitably in Thailand, in a much more ethical and sustainable manner.

Recommendations for market entry

1. Understanding the market

Prior to entering a new market, Australian businesses should gain a full understanding of the business environment of that market. This should take into account B&C considerations, including local attitudes towards these practices and common B&C practices of the selected Asian market and industry. For example, the B&C risks associated with the Indonesian oil and gas industry may be vastly different to that of the Chinese pharmaceutical industry.

Australian businesses should aim to be "culturally aware" of the local business practices and norms of the relevant Asian market, as well as having an understanding of the general local attitudes towards B&C. By including B&C considerations as part of the initial risk assessment and business planning for market entry, the investors will be able to have a broad and comprehensive view of the overall risks that will be faced in doing business in the market.

To achieve this requires deep research into the relevant market and support and advice from DFAT, Austrade, and other Australian and foreign businesses (through Chambers of Commerce and relevant industry associations). Local consultants and advisors can provide an expert view of the relevant market and the key considerations specific to that market and industry. Australian companies should particularly seek the counsel of specialist companies operating in the area of anti-bribery and corruption. Quality advice up front can often be the best investment a company will ever make.

By conducting detailed research and due diligence, and seeking quality advice on the target market, Australian businesses can gain a full understanding of the key B&C risk areas and the compliance costs that the business may face to operate in that market. This will inform the business of the resources required, recruitment practices to adopt for key local management, and the controls

and business strategies to be put in place to enable a successful entry into the market.

Furthermore, when considering entry into a new market, Australian businesses should develop a strong understanding of the local regulatory framework that applies to the business. In certain Asian countries, government departments hold significant approval and decision-making powers over foreign businesses. Coupled with local attitudes towards B&C and lax regulatory enforcement of B&C, significant B&C issues and risks can arise, directly impacting Australian businesses looking to enter the Asian market.

Licences, permits and other regulatory requirements can take longer to obtain, cost more or impact operations more significantly than expected, and requests for bribes may be made to expedite these regulatory processes. As such, having a clear understanding of the time and costs associated with complying with the relevant regulatory requirements, and factoring this into the market entry plan, is critical to mitigating the risk of exposure to B&C practices. Seeking advice from local advisors and experienced similar foreign companies regarding the regulatory requirements and processes of the relevant market can also assist to mitigate these risks.

By having a full understanding of the B&C and regulatory considerations required to operate in the relevant Asian market, and combining this with the broader commercial assessment, businesses will have a fuller picture of the risk-reward mechanics of doing business in Asia, and the controls and resources required to manage these risks.

This may well result in an overall commercial decision to delay or cancel expansion plans in a particular market, to consider alternative jurisdictions, or to accept the risks and press ahead. Whatever the case may be, thoroughly understanding the market is a vital first step of market expansion.

2. Understanding stakeholders

Relationships play a critical role in developing business in any market. The importance of developing a plan for a broad network within the target country cannot be overstated. New foreign businesses can struggle in countries with weak legal frameworks to manage and address B&C, fraud and other misconduct. As such, it is often through strong relationships with local stakeholders and leveraging of diplomatic and other relationships that can help to manage and address these issues.

As part of the planning for market entry, Australian businesses should undertake extensive stakeholder mapping to understand the key stakeholders and contacts in the market and specific to their industry who can impact the business (in either a positive or negative way). Stakeholder mapping is a process to visually identify and categorise stakeholders. This allows businesses to gain a full picture of the relevant stakeholders: the interests they represent; the amount of power possessed; if they are supportive or opposing to the business; and the right approach for dealing with them.

Stakeholder mapping can be undertaken internally where appropriate experience is available or by using external advisors. It is recommended that Australian companies should consider external support in stakeholder mapping, as seeing the full spectrum of stakeholders that may impact your business in Asia requires local understanding and is usually not available internally.

For any Australian business looking to expand into a new country, a first port of call should be to engage with Australian government agencies, particularly DFAT and Austrade. In addition, businesses will find value in connecting with bilateral business associations even before entering the market and with local business networks such as AustCham, Australian banks and other Australian businesses operating in the country.

Building a network of Australian and other foreign company relationships is an excellent way to get started in a new market. Through these relationships, Australian businesses can benefit from being able to access advice on a range of issues relating to doing business in the relevant country, including B&C issues and experiences. Austrade, in particular, can assist in providing research and resources to

assist Australian businesses to set up their operations. Both Austrade and DFAT can assist with providing introductions to local government departments and other government or regulatory contacts.

Our interviews and discussions in preparing this report identified that Australian companies often have a reticence to engage expert consultants and advisers as part of market entry preparations, preferring to do this internally to avoid the additional expense. Ensuring that well-regarded consultants, accountants and lawyers with local knowledge and experience are engaged from the outset to provide advice on engaging with third parties, compliance with local regulations and dealing with government departments can significantly increase a business' success in entering into a new market. If B&C and other sensitive/complex matters arise, these consultants and advisers also possess the skills, knowledge and experience to assist the business to best manage them in the relevant jurisdiction.

When engaging with local suppliers, customers, business partners and government agencies, it is important to ensure that Australian businesses know who they are dealing with. One risk that many foreign businesses face when entering a new market is the inability to appreciate or understand the hidden connections between seemingly disparate stakeholders, and as a result, the inability to appropriately identify and manage potential conflicts of interests. It is crucial that Australian businesses conduct rigorous due diligence on local third-party partners and suppliers that they are looking to engage with.

A thorough due diligence process will identify whether the relevant third party is financially sound and has legal and ethical business practices. Checks to identify any activity with sanctioned entities or questionable political connections, ongoing litigation and adverse media coverage all assist with identifying red flags that can prompt further investigation. It will also assist in identifying any potential conflicts of interests that the third party may have through its connections and relationships.

If a business is entering a market in a partnership or a joint venture, another critical aspect is ensuring alignment with values and culture. It is key that the local partner shares the same goals, values and standards as the Australian business and expectations are set on the compliance standards that need to be followed, prior to any relationships being formed.

At this point in an offshore expansion it is always valuable to remember the Chinese proverb: "A little impatience spoils great plans." Investing the time, resources and effort to deeply understand the market, stakeholders and partners before entry significantly increases the likelihood of business success.

3. Establishing a B&C Framework

Establishing a framework to identify, monitor and address potential B&C risks, and ensuring the Australian business' culture and values are imported into its Asian operations should be regarded as a business-critical strategic pillar.

Internal processes and procedures for identifying and managing B&C risks as well as staff attitudes towards it can either mitigate or heighten the risk of a business being subject to this problem. Australian businesses should understand that cultural attitudes towards B&C differ across Asia and these attitudes must be factored into the business' risk management framework.

The risk management framework should as a minimum include these elements:

- A clear and consistent B&C policy, endorsed by executive management and the board of directors of the company
- Strong processes and procedures for practically identifying and managing these risks, particularly for third parties, including the conduct of regular risk assessments and reporting of findings up to executive management and the board

- Transparent and clear lines of communication and escalation channels (including effective whistleblower protections)
- Tailored country specific training to ensure that local management and employees are aware of the risks and how they should deal with it
- Ongoing monitoring and review

The ISO 37001 Anti-Bribery Management System Standard sets a very useful international benchmark for managing B&C and can be used as a base to develop a risk management framework. This should be considered in the context of the business' operations, the countries in which the company operates (or plans to operate) and the local cultural and business norms and attitudes towards B&C.

B&C policies should be clear and consistent and should not have different rules between countries, even though practices on the ground in various countries may differ. The policy should clearly:

- articulate the organisation's attitude and approach towards B&C and the key roles and responsibilities of risk officers and management, both in the Australian head office and the local office;
- detail key controls that are in place throughout the organisation, such as dealing with third parties, gifts and expense management, procurement, accounting and security of physical assets;
- provide additional guidance to address any applicable jurisdiction-specific regulations, risks and cultural / business norms and attitudes towards B&C.

In addition to specific B&C risks, the risk management framework should also consider other related risk and compliance issues, such as fraud, money laundering, theft, tax evasion, modern slavery and cyber security, that could evolve into or expose the organisation to B&C.

B&C frameworks can be constructed to suit the size, scale and complexity of the business, and best practices, templates and suggested approaches are widely available through business associations and external advisors. B&C is a specialised subject and does require experience and expertise in setting up an appropriate risk management framework. It is important that this skill set is available internally in the business' risk management department through targeted hires. Otherwise, a trusted external advisor should be used to provide assistance and guidance when needed.

Phase two: How to manage B&C in an operational business

The entry into a new Asian market will be a time of great excitement and activity for a foreign business. However, it can also be a time of apprehension and uncertainty. Building relationships with key stakeholders, working with suppliers and business partners, hiring and management of local employees, and developing appropriate and effective internal policies and procedures are all necessary activities in the growth and success of the business in the new market.

B&C considerations should be front of mind in all these activities to ensure that adequate controls are in place to manage these risks.

When establishing the local Asian office and hiring local employees, Australian businesses should be mindful of the business culture of the local market. Norms and attitudes in Asia can be very different from the Australian way of working and doing business. These differences might include hierarchical management structures, restricted openness to raising and discussing difficult or complex issues and lax attitudes to B&C. Local management and employees are susceptible to B&C in a variety of ways (and in some cases, in ways which would not be contemplated in Australia). As such, it is important that an organisation's B&C framework is inclusive of these cultural nuances and is monitored and refreshed with these cultural nuances in mind.

Reality check: A case study in regulator relations

An Australian financial services company had been operating in South East Asia for many years. It had been working with a local joint venture (JV) partner, which was mandated under local regulations. The JV partner became insolvent due to its own poor financial situation and could no longer operate with the Australian company. The company had a strong and well-established relationship with the local business regulator, and because of this relationship, the regulator provided approval for the company to continue to operate while it sought a new local partner. However, after several months of searching, the Australian company was unable to identify a suitable local JV partner.

Following the national elections, a new government was elected which resulted in changes to local business policies and a restructuring of the local business regulator. The new regulator was less supportive of the issues faced by foreign companies and demanded the Australian company find a local partner immediately. In a meeting with the new regulator, an exemption from the JV partner legislation was offered to the Australian company in exchange for a 'goodwill' payment to a senior official of the regulator. The company refused to make the bribe and the relationship with the new regulator broke down. With no suitable JV partner identified and after numerous attempts at lobbying the new regulator, the Australian company's head office eventually decided to withdraw from the country and to concentrate their business operations in other Asian territories.

Due to the unfortunate circumstances, the Australian company could not sustain its operations in the Asian country but acted ethically and did not succumb to paying bribes. The company revised its B&C risk management framework, installed more controls to continuously review key partners and third parties, and hired additional support to monitor the country and political risks of the Asian jurisdictions where it operated. Having selected a new Asian country as its base, the company established fresh relationships with the new local regulator and other government departments, and ensured its B&C approach was clearly communicated upfront.

Recommendations for continuing operations

1. Building and managing relationships

Building and maintaining a network of relationships within the local market and with local government departments is very important for success in Asia. In markets where institutions are weak, relationships become a critical component in an organisation's risk management framework. They are strategic assets and should be managed as such. While local partners are important stakeholders in a relationship management plan, the management of an organisation's most valuable assets cannot be left to local partners alone.

Australian businesses should take the time to connect with their business/JV partners, market players, suppliers and regulators. This should be undertaken in a strategic and systematic manner, using stakeholder mapping (as noted in p8 and p9 above). Too often, Australian businesses rely on fly-in fly-out meetings to engage with local business partners in a short space of time. While this approach might work well in western jurisdictions, it is less appreciated in Asia, where a strong presence in the market and regular contact with key stakeholders is important to building trust and rapport. For example, a global retailer has a practice where it sends a small number of key managers into a new market for a year to conduct research and build relationships before they build their first store. Having an understanding of the local customs and business norms demonstrates a company's respect and seriousness about building strong relationships in the market. A strong network consisting of reputable local and foreign businesses and relevant government departments help local operations to run smoothly and can be called upon if difficult and complex local issues arise.

A local stakeholder map is critically important to understanding the main players in the relevant market. It is important to ensure that companies build and maintain

relationships with the "whole village," which is a key concept to be mindful of, regardless of the size of the market and the individual relationships built. As the business operates and grows, sometimes key stakeholders who were not initially obvious eventually become instrumental to the success of the business. So stakeholder mapping needs to be "live" in the business. Taking time to continuously refresh the local stakeholder map will ensure that new stakeholders and changes in existing relationships are identified.

Australian businesses should also encourage and facilitate relationships with competitors (subject to relevant competition and antitrust laws), especially with those from Australia and other Australian companies operating in-country to understand issues and areas of common purpose.

As a foreign business, it is also important to identify and build strong and ethical relationships with all levels of local government (national, provincial, city, district, village), regulators and industry agencies. These relationships are important to ensure the business' compliance with local regulatory requirements are adequately managed. However Australian companies should balance this with the risk of local executives becoming too close to local governments and agencies, as this can present opportunities for B&C to occur. Australian businesses should be particularly aware of Australian or foreign employees who have been in the local country for too long and may have "gone native" and become complacent in their management of B&C risks in a modern and legally responsible manner.

Australian businesses can also benefit from relationships with local media outlets and local charitable and philanthropic organisations. Local highly publicised events or charitable activities are a good opportunity for Australian businesses to highlight and give profile and "face" to local stakeholders. This can also be particularly beneficial in the eyes of local regulators.

Key customers can also play a role in managing B&C risk, by ensuring that they are fully aware of B&C policies as part of any deal. In an example of this, a key customer which was knowledgeable about a major Australian healthcare company's B&C policies and guidelines was able to spot suspicious activity. The key account customer queried irregular product pricing and activity by some of the company's in-market staff which were against guidelines. The query triggered an assessment process under the risk management framework, leading to the identification of fraudulent activity by the in-market staff. Under the company's zero-tolerance policy for B&C, the offending employees were immediately removed from the business, with the experience being used as a case study in later training sessions. The company's actions also reinforced its Australian parent's ethical reputation with its key account partners in the market.

2. Implementing the B&C Framework

As noted above, Australian businesses should ensure a strong, locally relevant risk management framework, is established. Of even greater importance is ensuring that the framework is implemented, lived and embedded in the culture of the relevant local operations. Experienced local leaders are the key to this and to the success of the Asian operations overall.. When recruiting local management, a critical consideration should be alignment with the values and standards of the Australian business. This alignment might be gained from experience working in multinational companies. It is important to do pre-employment due diligence to ensure that all claimed experience and qualifications are legitimate and are free from conflicts.

Australian businesses must ensure that B&C policies, procedures, materials and training are available online and are clearly communicated to local management and employees upfront. Online and in-person training should be delivered in the local language and tailored to the country to address relevant risks, case studies and examples, to ensure it is clearly understood. Situations involving B&C are not always black-and-white. Scenario-based training is needed to provide employees with an insight into the sort

of situations they may find themselves in and to help them to make the right decisions.

Similarly, when working with third parties, such as agents or consultants that are performing work on behalf of the business, there must be clear communication of the expectations on B&C. Compliance with the relevant policies and procedures should be agreed to in the contracts with third parties. Copies of Codes of Conduct, etc. can also be included as an integral part of agreements with local partners.

When implementing the B&C risk management framework, the local context in which the organisation operates must be considered. In most Asian countries, where there is a hierarchical business culture, openness and speaking up about sensitive and difficult issues is typically avoided. So, businesses must ensure clear escalation procedures are established, well understood and well documented as part of the B&C risk management framework. Businesses should also encourage a safe environment for local employees to escalate B&C issues when identified. Appropriate incentives and recognition tailored to what is actually valuable to local employees (rather than what management thinks is appropriate), can encourage and support local staff to adhere to good B&C compliance practices.

Active monitoring and audit processes should be undertaken to ensure that the B&C risk management framework and practices are relevant, effective and continually improved.

In particular, key processes susceptible to B&C - such as corporate gifts and expenses - must be monitored closely and systematically with regular audits. The audits should be done more frequently in high risk Asian jurisdictions. For larger businesses, automated solutions that monitor transactions, accounting entries and expenses can be used to alert compliance departments about any activity outside accepted tolerance or thresholds. Businesses should also consider independent audit or B&C reviews to ensure operations and controls are working as intended and to identify weaknesses.

3. The role of Head Office

For larger Australian corporates expanding into Asia, senior management and the board of directors should play a positive role in managing the B&C risk of overseas offices. Too often, Australian boards lack experience in Asia and fail to appreciate the cultural and business nuances of Asian markets and the challenges they pose to local management. This can result in poor direction and decision making, particularly with regard to risk management. To avoid any misunderstanding, the Australian board and senior management should be kept up to date with B&C risks in the Asian operations and actively consider them. The Australian board and Australian-based senior management should undertake cultural awareness training and it is critically important that they spend time in the local market to gain a deeper understanding of the local context in which the business operates.

Companies with Asian operations should ensure that B&C issues are a priority area of focus for executive meetings, board meetings, board audit and risk committee meetings on a regular basis, and consideration should also be given to setting up an anti-bribery board subcommittee in companies with extensive business in offshore markets. Companies can also consider including a B&C report in the Annual General Meeting agenda to ensure performance and issues are made aware to stakeholders. Promoting board diversity, particularly having members with deep on-the-ground experience in Asia, can contribute significantly to the ability to make effective decisions. Local advisory boards are also a good way to ensure that expertise is available close to the market.

The Australian board and senior management should also give proper attention to concerns from local Asian offices and ensure their voices are heard and included in the overall group's strategies and business decisions. Developing processes that build trust and understanding while enabling autonomy is critical.

Finally, it is important that members of the board and senior management make regular visits to the local Asian offices to support and reinforce the importance of B&C compliance to local management and employees, to engage with key local stakeholders and to support the local office's relationship

building efforts. These visits should be working visits to the market which provide local insights for individual senior company officials rather than ceremonial activities for a travelling group of directors and management.

As we have seen in recent years in Australia, leadership plays a critical role in setting the tone for the whole company and this extends to Asian operations. We have consistently seen that "culture trumps strategy" and this is even more critical in developing a risk-focused culture and attitude towards B&C.

Phase three: How to handle a B&C incident

Even with the best B&C risk management framework, Australian businesses may experience B&C issues in their operations. How this is handled can make or break the survival of a business in the Asian territory. As this paper has emphasised, these issues can occur in a variety of ways: with a government official or regulator; a local competitor, a key supplier or business partner; and with or without local management or employee involvement. B&C issues can be compounded with the threat of regulatory action, media scrutiny and even criminal proceedings. Whatever the case may be, there are several key actions and principles that Australian businesses can adopt to address and manage a possible B&C crisis in Asia.

One way to put a B&C challenge into perspective is to consider if it passes "The front page of The Australian Financial Review" test. That is, would the company be comfortable with seeing the issue reported in the media and the resulting reputational damage? Minor breaches should be handled appropriately according to guidelines, but serious issues must be handled with care, consideration and attention from Board and executive management.

Reality check: A case study in local relationships

An Australian consumer goods manufacturer operating a plant in South East Asia found that its water supply licence had expired. The manufacturer immediately started the application process and contacted the local regulator. The local regulator initially agreed to take no action against the company while the application for a new licence was in process. During this initial period the company realised that while its national and provincial relationships were strong, its relationships with local government officials and relevant departments were weak with ongoing delays in having the licence approved due to internal regulatory review. Government officials at the local regulator suggested a cash payment from the company could fast track the application process. The local plant manager reported the issue to the Australian head office and refused to make this payment, despite considerable pressure from the relevant government officials. After numerous refusals to pay the bribe, local government officials seized control of the plant and arrested the plant manager for operating the plant without the appropriate water supply licence.

Australian head office executives and directors mobilised lawyers and advisors to reopen the plant and to secure the release of the plant manager. Following months of mediation, the addition of diplomatic representation through DFAT eventually resolved the issues with the local government officials. The licence was renewed, the plant was reopened and the plant manager was released.

This was a very hard experience for the Australian company, given it had the right B&C infrastructure already in place. However, it recognised the importance of keeping on top of local licences and permits, the importance of having strong relationships particularly with the local government, and the importance of having a crisis-management plan in place. The company subsequently sought to rebuild and strengthen relationships with the government and the market, including "giving face" and recognition by involving local officials in media, charity and philanthropic activities.

Recommendations for handling B&C issues

When a B&C issue arises, it is important that there are clear and appropriate channels for the local office to escalate it to head office. B&C issues can be identified through a variety of sources including through regular reviews and audits, dealings with governments and third parties, employee escalation to local management, whistleblower disclosures and sometimes through the media.

It is important to ensure that head office is alerted about the allegations and all findings, communications, decisions and legal advice are fully documented to assist in any regulatory investigations that may arise. The head office should be seen to be doing the right thing to address the situation. In extreme situations, particularly involving physical danger to employees, some businesses may opt to make payments to ensure the safety of its employees. However, these payments, the rationale for the payments and the decision-making process behind making these payments should be fully documented and supported at Board level along with relevant legal advice.

Seeking professional advice and promptly conducting a thorough investigation into the matter will assist local management and head office to make sound decisions. When B&C matters arise from management or employee actions, businesses should take immediate action to identify all employees involved. Also consider if the B&C incident is linked to other illegal activities, such as fraud and theft. If required, early disclosure to the local and Australian regulators may be necessary to ensure that there is no appearance of delaying the reporting of serious issues. Depending on the issue, the relevant regulators or other industry agencies can also often offer considerable support and add to the business' paper trail of documentation and management of the issue.

If the issue relates to an engagement with local government or another business, raising the issue with Austrade or DFAT can also assist in providing support dealing with the matter. These channels can provide diplomatic means to connect with the local government or regulator and to discuss or mediate issues. The local network of other Australian and foreign businesses can also provide advice and experience on how to deal with such issues.

Once a B&C matter has been resolved, it is important to seek to repair relationships particularly with local government or regulators. This cannot be done overnight and requires a long-term patient approach to rebuild trust and rapport. Having senior management from head office involved in repairing these relationships and ongoing engagement is crucial, but also ensure that local management are building trust and improving connectivity regularly.

Where possible, ensure B&C issues are integrated into future training and are communicated to employees as case studies of what can go wrong. Ensure incidences are recorded in a risk register and use them for a review of the B&C risk management framework. Then update the policy, procedures and controls in place to address gaps and to reduce the risk of the issue does not arising again.

THE AUSTRALIAN GOVERNMENT ROLE

Australian government agencies, particularly Austrade and DFAT, but also other agencies such as Customs, Intellectual Property Australia, Attorney Generals Department and the Australian Federal Police, provide support to Australian businesses operating in overseas territories. These agencies have experience in supporting Australian businesses in Asia, when faced with serious B&C issues. However, our interviews and discussions found that the level of support does unfortunately vary across territories and more could be done to better connect and support businesses around B&C related issues. It has also been found that Australian businesses are not always clear on the roles and services that these departments play and may end up missing out on the valuable insight and support that they can provide.

To better support Australian businesses in Asian markets, the Australian government should consider enhancing the level of understanding of B&C risks faced by Australian companies in Asia within Austrade, DFAT and other agencies. This will allow these agencies to better support the handling of these matters and other illegal activities. To ensure a more consistent level of service, a comprehensive training plan as well as revised standard operating procedures should be put in place, to uplift capabilities in supporting B&C matters and this should be afforded to all overseas departments to ensure a more consistent level of service. A comprehensive briefing pack on B&C, relevant Australian and international legislation and the common issues faced by Australian companies should be provided as part of induction for new government officials sent to Asia.

In uplifting the B&C capabilities of each overseas office, this may also mean establishing connections with the counterparts of Asian government departments and regulators, where relationships have not previously been built. These efforts would be greatly appreciated by Australian businesses who likely have little support from foreign governments in times of crises.

The roles of, and services offered by, Austrade, DFAT and other agencies should be clearly communicated to overseas Australian businesses to ensure they know which agency can offer the right support when a B&C or other complex issue arises. This communication should include Australia's own anti-corruption laws.

The Australian Government should also consider the establishment of an office, a single contact window or hotline for Australian companies to raise concerns and seek advice on B&C matters and other complex in-market issues. This is most likely best housed in Austrade with support from agencies including DFAT, the Attorney Generals Department, the Australian Federal Police and Customs. This would allow Austrade to provide relevant advice and centralise international B&C expertise to better support Australian businesses.

> A more open environment is needed for Australian businesses facing B&C issues in Asia to be able to discuss them with relevant government agencies and to access support, counsel and assistance."

Finally, policy and legislative changes should be considered to encourage businesses to seek the support of Australian government agencies to address and manage B&C and compliance issues faced when operating overseas. This may include the inclusion of safe harbour provisions or engagement processes that give businesses confidence to openly and frankly seek assistance from the Australian government without fear of prosecution or liability for inadvertent compliance breaches or issues.

A more open environment is needed for Australian businesses facing B&C issues in Asia to be able to discuss them with relevant government agencies and to access support, counsel and assistance. Austrade and DFAT should continue to connect Australian businesses across the region and support cooperation, particularly drawing on businesses with experience in handling B&C, who can support others facing it for the first time. Business chambers in Australia and on the ground should also play a role in ensuring these issues are discussed and raised as standing agenda items in briefings and conferences.

CONCLUSION

Asia presents huge opportunities for Australian businesses of all sizes to grow and expand.

Many Australian businesses have operated successfully and ethically in Asia for decades, with sound B&C risk management practices in place. Nevertheless this issue has become the subject of many stories, sometimes relayed by individuals who were ill-prepared for doing business in the region. This Taskforce study has found that reconciling value and values is possible but requires a deep cultural understanding and considerable skill. Australian companies should be encouraged by these successes and understand that B&C issues are risks that can be considered and managed as part of a company's overall risk profile.

Nevertheless, Asia does contain B&C risks that can inflict financial and reputational damage from which is can be difficult to recover. Australian businesses must be aware of these risks and must manage them appropriately, by ensuring B&C is afforded the right level of attention throughout the entry and expansion into the region. Paying bribes is not a business strategy. It is lazy business practice and is illegal in most countries.

Successful management of B&C starts prior to entry into Asia by ensuring that it is included as an important and integral part of the market risk assessment. Once risks are understood, businesses should create a B&C framework to ensure that the infrastructure is in place to mitigate and manage these issues. After entering a market, businesses should implement their framework through processes, controls and training, and ensure that the culture of the Asian operations is in line with head office expectations, while being mindful of the cultural and business norms and attitudes of the local market. Using comprehensive stakeholder mapping, businesses should view relationship building activities in the market as not only an avenue to uncover commercial opportunities but also as a risk management tool. Strong relationships with JV and other business partners, suppliers, competitors, governments and other local, Australian and foreign businesses, can help with mitigating B&C issues. They can also assist with solving complex or sensitive B&C matters when they arise.

Ultimately when B&C issues do occur, it is imperative that processes are followed, and all evidence and decisions are correctly and fully documented. Leveraging commercial or government relationships may assist in the resolution of these difficulties as a part of risk management strategies. Businesses should ensure that all incidences are used as a learning opportunity to strengthen the B&C risk management framework, and ensure that relationships with government, regulators and business partners are nurtured in a systematic manner for sustainable operations in Asia.

> "Using comprehensive stakeholder mapping, businesses should view relationship building activities in the market as not only an avenue to uncover commercial opportunities but also as a risk management tool."

Australian government departments, particularly DFAT and Austrade can play a significant role in supporting Australian businesses in managing B&C in Asia. Encouraging connectivity between businesses and these government departments will contribute to sharing of knowledge, experience and best practices. When B&C crises do arise, better coordination of support from relevant government agencies to Australian businesses will improve the prospect of successfully resolving these issues for Australian business in Asia.

NOTES

1. https://www.transparency.org/en/news/asia-pacific-makes-little-to-no-progress-on-anti-corruption
2. https://www.transparency.org/en/news/cpi-2019-Asia-Pacific
3. https://www.pwc.com.au/consulting/assets/pwc-gecs-2020-au-report.pdf

In October 2019, the Business Council of Australia and Asia Society Australia together with knowledge partners PwC Australia and the University of Sydney Business School formed the Asia Taskforce of senior leaders from the business, education and government sectors to examine how Australian companies and organisations can increase their presence and position in Asia to ensure our continued prosperity and deliver progress for future generations.

While the Anti-bribery and Corruption Sub-Committee Members named below have provided input into the discussion paper, the views expressed do not necessarily reflect the views of any individual or the organisations they represent.

This paper refers to Asia as the countries of South East Asia, South Asia and North East Asia.

This Discussion Paper and other publications by the Taskforce can be found at

https://asiasociety.org/australia/asia-business-taskforce

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